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Supreme Court, U.S.
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No. 97-49

In The

Supreme Court of the United States

October Term, 1997

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COLUMBIA STEEL CASTING CO., INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITIONER'S RESPONSE TO THE SOLICITOR GENERAL'S BRIEF

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PARTIES TO THE PROCEEDING

There have been no changes to the list of parties reported in PGE's previous brief.

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INTRODUCTION

Since at least 1980, the Solicitor General has consistently opposed the state action doctrine on behalf of the United States. During that time, this Court has frequently rebuffed the Government's position in order to defend the interests of federalism and the authority of the states to implement their policies. This Court's decisions have been plain that this was the manifest intent of Congress.

It is thus not surprising that the Solicitor General has urged the court to decline review in this case in which the state action doctrine has received a crabbed interpretation, and the state policy with respect to the delivery and pricing of electricity is thwarted. As far as we can tell, the Solicitor General has never yet found the state action defense to be meritorious in any case in this Court. As far as we can tell, the Solicitor General's recommendations are consistently against certiorari whenever the state action defense was rejected below, and consistently in favor of certiorari whenever it prevailed below.

The steadfast nature of the Solicitor General's support for any decision that undermines the state action doctrine is revealed in the contrived effort to wish away the plain doctrinal conflict between the decision below and the Eleventh Circuit's holding in *Praxair* discussed within. The skepticism that this Court showed by granting certiorari in another case last month in spite of the Solicitor General's negative recommendation is appropriate here as well. (*NYNEX Corp. v. Discon, Inc.*, No. 96-1570 (cert. granted March 23, 1998)). The Court should grant this petition and allow the Solicitor General to defend the judgment below on the merits, rather than ignoring the conflict between the circuits that has significant implications for federalism.

1. The Government's version of the state action doctrine is in conflict with the principles of federalism.

A quick way to see what is wrong with the Government's position is to begin with the following passage from its brief. The Government summarizes and approves the decision below as follows:

> "The PUC did not specifically and clearly authorize *by the relevant statutory process* a division of the Portland market into exclusively served territories."

(Solicitor General's brief at 11, emphasis added, internal punctuation omitted.)

The italicized words are the key. They are what the Ninth Circuit---and now the Government---have grafted on to the state action doctrine. They are the vehicle by which the Ninth Circuit and the Government would trespass on state authority.

The *"relevant statutory process"* that they refer to is a *state* statutory process, not a federal one. The Ninth Circuit and the Government here insist that it is the role of a *federal* court to review the action of a *state* agency to determine that a *state* agency is not in sufficient compliance with *state* statutory procedure---even if the *state* courts have already come to the opposite conclusion.

Our case hinges on the addition of these italicized words to the state action doctrine. Omit them, and the case comes out the opposite way. For whether or not the PUC sufficiently observed *"the relevant statutory process"* when it divided the Portland market, it *did* divide it nevertheless, and it has been actively enforcing that division for nearly 20 years. That is beyond dispute. The District Court made an explicit finding that "the OPUC has acted to prevent PGE"

from competing, while nevertheless imposing treble damages on PGE for submitting to the OPUC. (Petition at 11.) There is a final state judgment between these same parties that so holds. (App. M-20; O-2; P-1, 2.) Columbia Steel alleged the same thing in the complaint itself, and all the parties admitted it was true. (Petition at 19; Petitioner's Reply at 1, text at n.1.) Columbia Steel even demanded an injunction to make the OPUC *stop* enforcing its division of the Portland market.[1] (*Id.*)

For the Government, however, it is irrelevant that it was actually the OPUC who was dividing the market, and who was telling PGE what to do. For the Government, the question instead is whether the OPUC, in telling PGE what to do, was complying with *"the relevant statutory process"*--- *i.e.*, with the *Oregon* statutory process. And for the Government, that is a job for the *federal* court. The Government therefore endorses the view, disapproved by this Court, that would make the federal court the reviewer of *state* activity

> whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 370-72 (1991).

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[1] In other words, Columbia Steel asked the federal court to suppress state action because it didn't qualify as "state action".

2. The Government is arguing the position that this Court rejected in *Southern Motor Carriers.*

The Government attempts to revive an argument that it lost when this Court decided *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985). In *Southern Motor Carriers,* the Government argued unsuccessfully that the first prong of the state action doctrine ---the "clear articulation" requirement---is not satisfied by state statutes that merely *permit* anticompetitive conduct, but do not *require* it.

In our case, the Government once again asserts that the "clear articulation" requirement is not satisfied by the Oregon statute, because it merely "permits" anticompetitive conduct. (Solicitor General's brief at 12.) The Government therefore would use that previously rejected distinction as an opening to invent a restrictive new addition to the state action doctrine. When statutes merely "permit" anticompetitive conduct, the federal courts must now subject the action of the state agency to a double test, under both prongs of the state action doctrine. It is not enough that the OPUC satisfies the second prong of "active supervision," *i.e.* that the OPUC has actively suppressed competition in the Portland market for two decades. The text of the original agency order must also be subjected to the federal court's "rigorous" test for clarity. It will fail that test upon any whiff of "ambiguity," notwithstanding the succeeding decades in which the state agency has emphatically made its will abundantly clear.

This transforms the "clear articulation" requirement into a shibboleth, divorced now from its original purpose of ascertaining the state's actual intent. As a shibboleth, it is a tool by which the federal courts can override intentional state action that they disapprove of. It becomes irrelevant in our case that the Oregon Legislature encouraged the allocation of markets, turned the supervision of the details over to the

OPUC, and that the OPUC then enforced the allocation of Portland throughout two decades. Instead, the Court of Appeals, with the encouragement of the Government, wields the "clear articulation" requirement to declare that the *words* that the OPUC first used 25 years ago don't suit their present "rigorous" standard for clarity, and therefore punishes PGE for submitting to what truly has been state action in any realistic sense of the phrase.

3. The Government's position does not accord full faith and credit to the prior state judgment.

Another principle of federalism is the full faith and credit that federal courts must grant to state decisions. Unfortunately, the Government appears indifferent in our case to this principle as well.

There is a final *state* court judgment, binding on all the parties to the present case, that the Portland market has been allocated and divided ever since 1972. (Petition at 26-29.) The Court of Appeals, not wishing to be bound by this prior state decision, chose to distort it. (*Id.*) The Government now follows suit.

The Government would have this Court think that the prior state decision does little more than acknowledge that there was "perhaps" an ambiguity in the 1972 Order. Yet the Government remains determinedly silent, like the Court of Appeals, about what is actually held in that prior state decision. In particular, that prior decision holds:

(1) that the 1972 Order made the statutory findings required by the allocation statute; and

(2) that such findings, "without more," automatically effectuate the allocation of

> the market "by operation of [state] law."[2] (App. M-18; *see also* M-1, N-2-3; O-1, 2; P-1-2.)

There exists therefore a prior state judgment that Portland had been allocated by means of the state "*relevant statutory process*" that the Government and the Court of Appeals purport to champion---but whose prior interpretation in the state judgment between the same parties they refuse to honor.

When a Court of Appeals refuses to be bound by the full faith and credit requirement, it need not say so directly: it need only ignore the inconvenient words of the state decision, and distort the remainder. We submit that by itself this is reason enough to grant certiorari in our case: only this Court can enforce on the Courts of Appeals the duty to acknowledge fairly what was actually said and decided by the state forum.

The state forum declared of the 1972 Order that "there was no doubt as to its substance" in allocating Portland. (App. M-18, N-3, O-2, P-1,2.) PGE was therefore correct in understanding that binding order and in complying with state enforcement of that order, while the federal court declares that PGE's correct understanding and obedience to its duty under state law must be penalized with treble damages. The Government is regrettably indifferent to the injustice, to say nothing of the havoc wreaked upon the principles of federalism, of inflicting treble damages on PGE

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[2] This was the same explanation that the Oregon Department of Justice gave PGE, on behalf of the PUC, as to why PGE could not do what Columbia Steel demanded. (App. U-2, 3.) PGE thereafter told Columbia Steel that it would not comply with its demand. (App. F-10, 11.) According to the District Court, this triggered PGE's treble damage liability. (App. F-22.)

under *federal* law for having correctly understood and obeyed valid *state* law.

4. The Government cannot reconcile the conflict between the Ninth Circuit and the Eleventh Circuit.

The Government's attempt to reconcile the decision below with the Eleventh Circuit's conflicting decision in *Praxair* is not only insufficient, but halfhearted to boot. *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996).

The Government first toys with an irrelevant distinction---a distinction that the Court of Appeals appears to have relied upon (App. A-15 n. 8)---but then concedes that its validity is not "probable." (Solicitor General brief at 15, last lines.) Instead, the Government is reduced to supposing that the *evidence* must have been stronger in the Florida case. (Solicitor General's brief at 15-16.) The Government declares that both our case and *Praxair* are "close cases" on their facts, and that our case presents merely a "factbound" question of no interest to this Court. (Solicitor General's brief at 8, 11 n. 5.)

This is nonsense. Both our case and *Praxair* were decided by summary judgment. Cases that are "close cases" on their facts aren't decided by summary judgment. In order to shoehorn our case into the "factbound" rubbish bin, the Government would have this Court suppose that *both* the Eleventh Circuit and the Ninth Circuit so far forgot the basic rules of summary judgment that they weighed the evidence in each respective case as if they were sitting as juries, and that the Eleventh Circuit must have found that the evidence in the "close case" that it decided was "substantially stronger" than the evidence in the "close case" before the Ninth Circuit. (Solicitor General's brief at 16.).

The Government's conjecture about the relative strength of the evidence rests on nothing more than the *ipse dixit* of the Solicitor General. It is a transparent attempt to avoid conceding the obvious: that these two summary judgments came out opposite because the two circuits applied conflicting principles of law, and that the Government cannot think of a single distinction between the two cases other than inventing this *ipse dixit* notion about the supposed "strength of the evidence." And for that matter, on what basis can the Government make a representation to this Court that the "maps" in the Florida case were "substantially stronger" evidence than, say, OPUC's 20 year pattern of suppressing competition in our case? (Solicitor General's brief at 16.)

It is manifest that the two circuits did apply conflicting principles of law. The Eleventh Circuit overruled the Florida district court for doing precisely what the Ninth Circuit did, *i.e.* restricting itself to an analysis of the Florida Commission's original order. *Praxair* at 612. The Eleventh Circuit did not ask, as did the Ninth Circuit and now the Government, whether the Florida Commission had complied with the "relevant statutory process" in its original 1965 Order. The Eleventh Circuit did not test the original Florida Commission Order by the "rigorous" standard of "clarity" which the Ninth Circuit and the Government now champion. Indeed, the Eleventh Circuit did not view it as a "clear articulation" issue at all, but rather as a second prong issue of "active supervision." *Praxair* at 611-612.

The Eleventh Circuit sought the state's intent. The Ninth Circuit disclaimed any interest in the state's intent, and cared only whether the 1972 Order contained the right statutory citation and the magic word "exclusive."

The Ninth Circuit's approach should be rejected. The issue is important precisely because this is a conflict between state authority and federal authority. The Eleventh Circuit's approach was designed to make certain that the federal court

did not interfere with actual state action and intent. The Ninth Circuit's approach is indifferent about actual state action and intent, and is careless about inflicting chaos into the intricate process of state agency supervision of a public utility.

5. The Government cannot reconcile the conflict between the Ninth Circuit and the Tenth Circuit.

Even if the OPUC and the state courts were wrong about state law, and even if a federal court can ignore their interpretation of state law, the state action defense should still apply in accordance with the contrary holding of the Tenth Circuit in *Lease Lights v. Public Service Co. of Oklahoma*, 849 F.2d 1330 (10th Cir. 1998), cert. denied, 488 U.S. 1019 (1989). That is because the OPUC's enforcement of its interpretation of its own order bore at least "the appearance of legality." *Lease Lights* at 1334. Right or wrong, the OPUC's instructions still constituted *state* action instead of a private conspiracy. The Government, however, declares that a utility cannot rely on what the OPUC says, and must seek further rulings. (Solicitor General's brief at 16 n 8.) Yet the Tenth Circuit held the opposite, relying on Professors Areeda and Hovencamp, and declared that a utility does *not* have to challenge what the agency says. (Petition at 25.)

Furthermore, when this dispute arose, PGE *did* seek a clarifying ruling from the OPUC. Yet the federal courts below refused to honor the jurisdiction of the OPUC to interpret its own orders, and treated the OPUC as merely another litigant in federal court. (Petition at 9; App. D-7, 8.)

The Ninth Circuit and the Tenth Circuit therefore remain in conflict about whether the state action defense protects a utility who in good faith (App. F-18) complies with the arguably mistaken instructions of its state regulatory agency.

6. The Court should grant the petition.

For these and the other reasons previously stated, this Court should grant the petition.

Respectfully submitted,

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